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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-825

UNIVERSITY OF SOUTHERN CALIFORNIA, a nonprofit corporation,

Petitioner,

vs.

COST OF LIVING COUNCIL and OFFICE OF EMERGENCY PREPAREDNESS, Agencies of the Government of the United States of America,

Respondents.

Petition for a Writ of Certiorari to the Temporary Emergency Court of Appeals

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UNIVERSITY OF SOUTHERN CALIFORNIA, a nonprofit corporation,

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COST OF LIVING COUNCIL and OFFICE OF EMERGENCY PREPAREDNESS, Agencies of the Government of the United States of America,

Respondents.

Petition for a Writ of Certiorari to the Temporary Emergency Court of Appeals

Petitioner, University of Southern California, prays that a Writ of Certiorari issue to review an order of the Temporary Emergency Court of Appeals.

Opinion Below

The opinion of the Temporary Emergency Court of Appeals is not yet officially reported, but as reported in Commerce Clearing House, *Economic Controls* ¶ 9880, it is set forth in Appendix "A" to this petition. The opinion of the District Court for the Central District of California is reported at 342 F.Supp. 606 (1972) and is set forth in Appendix "B".

Jurisdiction

The initial decision of the court below was issued on September 19, 1972. An order of that court denying petition for rehearing was entered on November 8, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

A. Whether the President, in issuing Executive Order No. 11615, intended to and authorized Respondents to require refunds on ticket sales consummated prior to its promulgation.

B. Whether the application of Executive Order No. 11615 (the wage-price freeze) to require refunds on ticket sales consummated prior to the effective date thereof denies Petitioner its Constitutional right to due process of law under the Fifth Amendment to the United States Constitution.

C. Whether the application of Executive Order No. 11615 (the wage-price freeze) to require refunds on ticket sales consummated prior to the effective date thereof constitutes an *ex post facto* law as proscribed by Article I, Section 9, Clause 3 of the United States Constitution.

D. Whether the application of Executive Order No. 11615 (the wage-price freeze) to require refunds on ticket sales consummated prior to the effective date thereof constitutes a bill of attainder as proscribed by Article I, Section 9, Clause 3 of the United States Constitution.

Constitutional Provisions, Executive Orders and Regulations

United States Constitution, Article I, Section 9, Clause 3:

> "No Bill of Attainder or ex post facto Law shall be passed."

United States Constitution, Article I, Section 10, Clause 1:

> "No State shall . . . pass any . . . Law impairing the Obligation of Contracts. . . ." (Full text set forth in Appendix "C".)

United States Constitution, Fifth Amendment:

> "No person shall . . . be deprived of . . . property, without due process of law. . . ." (Full text set forth in Appendix "C".)

Executive Order No. 11615 § 1(a), 36 Fed. Reg. 15727 (1971):

> "Prices, rents, wages, and salaries shall be stabilized for a period of 90 days from the date hereof at levels not greater than the highest of those pertaining to a substantial volume of actual transactions by each individual, business, firm or other entity of any kind during the 30-day period ending August 14, 1971, for like or similar commodities or services. If no transactions occurred in that period, the ceiling will be the highest price, rent, salary or wage in the nearest preceding 30-day period in which transactions did occur. No person shall charge, assess, or receive, directly or indirectly in any transaction prices or rents in any form higher than those permitted hereunder, and no person shall, directly or indirectly, pay or agree

to pay in any transaction wages or salaries in any form, or to use any means to obtain payment of wages and salaries in any form, higher than those permitted hereunder, whether by retroactive increase or otherwise."

Economic Stabilization Regulation No. 1, 32A C.F.R. Chapter I, 36 Fed. Reg. 16515 (1971) (See Appendix "C").

Statement of the Case

Petitioner is a nonprofit corporation organized and existing pursuant to the laws of the State of California, having its principal place of business in Los Angeles, California, and engaged in the operation of a private university. Respondents Cost of Living Council and Office of Emergency Preparedness are agencies of the Government of the United States of America.

On January 28, 1971, Petitioner decided by official resolution to increase the price of reserve seat tickets for each of its 1971 home football games by fifty cents over the price charged during the 1970 season. On April 30, 1971, Petitioner implemented the new prices by distributing printed brochures soliciting the purchase of such tickets at the increased prices. Thereafter, prior to August 15, 1971, Petitioner consummated sales of and received payment for approximately 140,000 reserve seat tickets for football games to be played during Phase I of the economic stabilization program. All of such tickets were sold on a nonrefundable basis, were fully transferable and entitled the purchaser to certain immediate benefits.

On August 15, 1971, the President of the United States issued Executive Order No. 11615, "freezing" all prices at the levels in existence prior thereto. Five football games were played during the following ninety days (Phase I), and the parties are in agreement that only the prices for reserve seat tickets to such five games are at issue in this litigation. On October 5, 1971, the Office of Emergency Preparedness advised Petitioner that the prices for such tickets were in violation of the Economic Stabilization Act of 1970, P.L. 91-379, 84 Stat. 799, and Executive Order No. 11615.

This is a proper case for the original exercise of federal jurisdiction because it involves a controversy which exceeds the sum of $10,000, exclusive of interest and costs, and arises under the Constitution and laws of the United States of America. It was commenced by Petitioner on October 7, 1971, seeking a judgment declaring, *inter alia*, that the prices charged for its 1971 football tickets were in compliance with Executive Order No. 11615 and that the administrative ruling by Respondents which had sought to require Petitioner to reduce the prices of such tickets was invalid. Petitioner's motion for summary judgment was heard in the United States District Court for the Central District of California, before the Honorable William P. Gray, on March 27, 1972 and was granted on May 12, 1972.

Respondents appealed from such judgment to the Temporary Emergency Court of Appeals. The appeal was heard in Los Angeles, California on August 28, 1972; and on September 19, 1972, the Temporary Emer-

gency Court of Appeals reversed the decision of the District Court and remanded the case for further consideration. Petitioner's petition for rehearing was denied on November 8, 1972.

The decision of the Temporary Emergency Court of Appeals holds that Phase I of the economic stabilization program, which was announced by Executive Order No. 11615 on August 15, 1971 for the purpose of freezing prices charged during the following ninety-day period at levels being charged prior thereto, applies to prices charged for football tickets which were sold well prior to August 15, 1971. The retroactive effect of this decision violates substantial Constitutional rights and was clearly neither intended nor authorized by the Executive Order. It is this error upon which this Petition is based.

REASONS FOR GRANTING THE WRIT

I.

The Temporary Emergency Court of Appeals Has Decided Important Questions of Federal Law Which Have Not Been, but Should Be, Settled by This Court.

The instant proceeding involves questions arising under the Economic Stabilization Act of 1970 and Executive Order No. 11615 which have not been settled by this Court. Such questions are of exceptional importance and should be settled by this Court for two reasons: (A) The issue as to what prices could legally have been charged for sports events or other performances by nonprofit educational institutions occurring during Phase I affects numerous other institutions; and (B) The precedent set by the Temporary Emergency Court of Appeals with respect to the extent of judicial deference to be afforded administrative interpretations issued by the Cost of Living Council has far-reaching implications as to the administration of policies to be implemented during the remainder of the economic stabilization program.

A. Counsel for Petitioner has been informed by Counsel for Respondents that more than twenty institutions have been investigated for violations of the exact same guidelines as involved in the instant proceeding. In each instance, a lawsuit is either currently pending or will be either instituted or threatened as soon as the decision of the Temporary Emergency Court of Appeals becomes final. The decision in the instant case will be dispositive of such actions. Moreover, even in instances in which lawsuits are not actually filed, the decision in the instant case will effectively control informal settlement of such matters.

In addition, because of the timing of the football season in relation to Phase I, it is undoubtedly true that literally hundreds of nonprofit colleges throughout the country are similarly situated. The same is certainly true of hundreds of public and private high schools and innumerable civic musical and dramatic associations. Even if Respondents themselves do not bring legal actions against all of these institutions, class actions could be brought by private citizens.[1] Such lawsuits are becoming increasingly common and would seem highly likely in these instances since: (1) the instant decision would be dispositive precedent on the sole legal issue involved in any such action, and (2) problems of proof in cases involving ticket sales are virtually nonexistent.

The potential for revenue loss which could be inflicted upon nonprofit, public, educational and other institutions as a direct result of the decision herein is overwhelming. This threat seems especially unwarranted in view of the fact that such liability would have accrued through good faith sales, legal when consummated, occurring months before the advent of Phase I.

B. The instant decision is concerned primarily with the extent to which federal courts, in considering questions arising under the economic stabilization program, should pay deference to policy statements issued by the Cost of Living Council. In upholding Respondents' position in the instant case, the Temporary Emergency Court

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[1]Indeed, at least one private class action has already been filed against a private nonprofit university seeking refunds and damages for football ticket sales under circumstances substantially identical to those which exist in the instant case. *John T. Manning, and all similarly situated and affected v. The University of Notre Dame du Lac*, Civil 72-S-218 (D.C. N.D. Ind., filed October 26, 1972). The prayer in such matter is in excess of $37 million.

of Appeals paid slavish and unwarranted deference to administrative policy statements, despite the irrational and unconstitutional result. Such deference exceeds the bounds of administrative deference previously set by this Court.

Although the specific guidelines involved herein were issued during Phase I, the Cost of Living Council survived the transition from Phase I to Phase II and is still formulating and issuing policies which have a profound effect upon this country's economy. As a result, the extent of the Cost of Living Council's authority will frequently be an important issue in future actions. It is submitted that the precise extent of such authority should be explored and dealt with thoroughly by this Court in the instant case.

II.

The Temporary Emergency Court of Appeals Has Decided a Federal Question in a Way in Conflict With Applicable Decisions of This Court and Has so Far Departed From the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of This Court's Power of Supervision.

A. The President, in Issuing Executive Order No. 11615, Neither Intended to nor Authorized Respondents to Require Refunds on Ticket Sales Consummated Prior to Its Promulgation.

The President of the United States, in issuing Executive Order No. 11615, clearly announced that it was intended to freeze only those prices charged after August 15, 1972.[2] By its very nature, as well as by its explicit

[2]Executive Order No. 11615 § 1(a) provides as follows: "Prices, rents, wages, and salaries shall be stabilized for a period of 90 days *from the date hereof*. . . ." (Emphasis added.)

wording, the Order was to operate "in futuro." *Amalgamated Meat Cutters and Butcher Workmen v. Connally*, 337 F.Supp. 737, 764 (D.D.C., 1971). The regulations issued pursuant to the Executive Order provide, "No person may *charge, assess, or receive* [after August 15, 1971] more for commodities or services . . . [than the base price]. . . ." 32A C.F.R. § 2(a)[3] (Emphasis added). By its express terms, the section operates to control only the *charging, assessing, or receiving of money*. Thus, it appears obvious that the Regulation cannot be invoked to regulate in any manner sales in which money was charged and received prior to Phase I. Such action was neither intended nor authorized by the President.

Moreover, it should be noted that neither Executive Order No. 11615 nor Regulation No. 1 actually authorizes courts to order *refunds* of amounts received in excess of Phase I price control guidelines. Accordingly, such authority, if it in fact exists, arises from the court's general equity powers. This authority was exercised in *United States v. Lieb*, T.E.C.A., Dkt. 5-1, June 14, 1972, *CCH Economic Controls* ¶ 9918, when the court ordered refunds of rent overcharges. In such case, however, the illegal rent increases went into effect on September 1, 1971, *a date after the freeze period began.* The instant case involves prices which went into effect and were collected *well prior to the freeze period;* and, as a result, refunds on tickets sold before August 15, 1971 could only be ordered based upon the court's equity power to restore the *status quo ante*. In this regard, it should be noted that the *ex post facto* clause of the Constitution would clearly prohibit imposition of

[3]Full text of 32A C.F.R. § 2(a) is set forth in Appendix "C".

criminal penalties for sales which occurred prior to the date the Executive Order was issued and which were completely legal when consummated. It is submitted that, since such sales cannot now retroactively be deemed to have been illegal, the court does not have the equity power to force refunds with respect thereto. In ruling to the contrary, the Temporary Emergency Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

B. The Application of Executive Order No. 11615 to Require Refunds on Ticket Sales Consummated Prior to the Effective Date Thereof Denies Petitioner Its Constitutional Right to Due Process of Law in Impairing Petitioner's Right to Contract and Depriving It Retroactively of Vested Property Rights.

The Constitutional prohibition against impairment of contracts, although expressly applicable only to states by the wording of Article I, Section 10, Clause 1 of the United States Constitution, is applicable to the Federal Government through the Due Process clause of the Fifth Amendment. *Highland v. Russell Car & Snow Plow Co.*, 279 U.S. 253 (1929).

The extent to which the Federal Government may impair rights under existing contracts was discussed specifically in relation to Phase I in *Amalgamated Meat Cutters and Butcher Workmen v. Connally*, 337 F.Supp. 737 (D.D.C., 1971). Although the opinion of the District Court, in finding no constitutional objection on this basis, pointed out that, ". . . contracts do not fetter the constitutional authority of Congress," *Id.* at 763, it specifically took note of the fact that "*The Executive Order operates in futuro*, to wage increases becoming effective subsequent to its

issuance." *Id.* at 764 (Emphasis added). If the instant case had involved ticket price increases which became effective subsequent to August 15, 1971, it might be that no Constitutional objection could validly be raised on this basis. However, the fact is that, in this instance, the prices were actually in effect and Petitioner had consummated approximately 140,000 sales prior to such date. As its part of the bargain at the time of sales, well prior to August 15, 1971, Petitioner immediately gave substantial consideration and began training its football team.

In *Coombes v. Getz,* 285 U.S. 434 (1932), the United States Supreme Court held that the Due Process clause of the Fifth Amendment prohibits Congress from passing laws which retroactively deprive any person of a legally acquired, vested property right. Clearly, Petitioner's right to keep nonrefundable money, collected for sales consummated prior to the effective date of the Executive Order, and wholly legal at the time, constitutes a vested property right. Accordingly, it is respectfully submitted that to require retroactive refunds for such sales deprives Petitioner of vested property rights, without due process of law, in violation of the Fifth Amendment to the United States Constitution. In upholding such action, the Temporary Emergency Court of Appeals has decided a question of federal law in a way in conflict with applicable Constitutional decisions of this Court and has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

C. The Application of Executive Order No. 11615 to Require Refunds on Ticket Sales Consummated Prior to the Effective Date Thereof Constitutes an Ex Post Facto Law as Proscribed by Article I, Section 9, Clause 3 of the United States Constitution.

The United States Constitution provides, "No . . . ex post facto Law shall be passed." Article I, Section 9, Clause 3. Pursuant to an Act of Congress, the President issued Executive Order No. 11615, stabilizing prices charged after August 15, 1971 at the levels charged prior thereto. Respondents then interpreted such Order to require Petitioner to refund money received from sales which were consummated as much as three and one-half months prior to August 15, 1971. A demand was made by Respondents that Petitioner refund large sums of money to the purchasers. Implicit in such demand was the threat that, if Petitioner failed to effect such refunds, it could be prosecuted for willful violation of the Order and fined $5,000 for each violation. Executive Order No. 11615 § 7(a).[4] Petitioner submits that upholding such a retroactive application of the Executive Order involves a clear invasion of its fundamental Constitutional rights in that such is an *ex post facto* law.

A law which applies to actions legally taken prior to passage thereof, and which acts to punish the perpetrator of such action, constitutes an *ex post facto* law and violates Article I, Section 9, Clause 3 of the United States Constitution. Moreover, the law has long been that the Constitutional prohibition may not be evaded by giving a civil form to a measure which is essentially criminal. *Burgess v. Salmon,* 97 U.S. 381 (1878). In

[4]Set forth in Appendix "C".

the instant case, Respondents demanded refunds of money collected prior to Phase I under the clear potential threat of imposing criminal fines for willful violation. The refund demand in lieu of the penalty imposed by law clearly constitutes punishment. In a similar case involving a World War II price control regulation, the court found no violation of the prohibition against *ex post facto* laws, but noted that such regulation was applied solely to price changes occurring *after* the regulation was issued. *Ambrosia Brewing Co. v. Bowles,* 147 F.2d 550, 553 (U.S. Em. Ct. App., 1944). In the instant case, by contrast, Respondents are seeking to apply their regulations to prices which were in effect and sales which were consummated several months prior to promulgation of the law.

It is clear that, under the interpretation upheld by the Temporary Emergency Court of Appeals below, Petitioner has been punished for actions which were wholly legal when taken; and, as noted above, presenting Petitioner with the alternative of making enormous cash refunds or facing fines for willful violation of federal law, clearly amounts to punishment. It is submitted that such action interprets the Executive Order in such a manner that it constitutes an *ex post facto* law, in violation of Article I, Section 9, Clause 3 of the United States Constitution. For this reason, it is submitted that, even if Respondents could constitutionally regulate the price charged for tickets purchased subsequent to August 15, 1971, they may not do so for

tickets purchased prior thereto. In ruling to the contrary, the Temporary Emergency Court of Appeals has decided a question of federal law in a way in conflict with applicable Constitutional decisions of this Court and has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

D. The Application of Executive Order No. 11615 to Require Refunds on Ticket Sales Consummated Prior to the Effective Date Thereof Constitutes a Bill of Attainder as Proscribed by Article I, Section 9, Clause 3 of the United States Constitution.

The United States Constitution provides, "No Bill of Attainder . . . shall be passed." Article I, Section 9, Clause 3. This Court has held that a legislative act, regardless of its form, which applies to an easily ascertainable group of people in such a way as to inflict punishment without a judicial trial, constitutes a bill of attainder. *United States v. Lovett,* 328 U.S. 303, 315 (1946). In the instant case, Congress acted through the President of the United States and Respondents. The administrative guidelines involved in this case[5] directed action against an easily and clearly ascertainable group, to wit, all sellers of 1971 reserve seat football tickets at prices which exceeded the previous year's prices. Clearly, such a group comprises one of sufficient specificity. *United States v. Brown,* 381 U.S. 437, 461 (1965).

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[5]See Cost of Living Council Summary No. 3, set forth, in pertinent part in Appendix "C".

Pursuant to such guidelines, Petitioner was ordered to make refunds or, implicitly, face fines for willful violation of the Economic Stabilization Act of 1970. Presenting Petitioner with these alternatives clearly amounts to punishment without a judicial trial. Petitioner submits that, regardless of whether Respondents have ever actually brought criminal actions in instances similar to the instant case, the law does give them the right to do so. Moreover, in seeking "voluntary compliance" from various institutions, the implicit threat of actions for criminal penalties obviously plays a major role. Indeed, Respondents pointed out in their Opposition to Appellee's Petition for Rehearing, submitted to the Temporary Emergency Court of Appeals below, that the "large majority" of institutions which were "requested to voluntarily comply" did so (Appellants' Opposition at 2) and that they expect the decision in the instant case to effect the same result with those institutions against whom lawsuits have already been filed.

In issuing the pertinent guidelines, Respondents made the determination that, by virtue of ticket sales which took place prior to Phase I, certain individuals were guilty of increasing prices in violation of Phase I. To uphold such administrative assessment of blameworthiness, as the Temporary Emergency Court of Appeals has done, constitutes a bill of attainder and clearly conflicts with the Constitutional prohibition against such bills. In issuing its interpretation, the Temporary Emergency Court of Appeals has decided a federal question in a way in conflict with applicable Constitutional decisions of this Court and has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX "A"

University of Southern California v. Cost of Living Council, et al., Temporary Emergency Court of Appeals, Dkt. 9-1, September 19, 1972.

Tamm, Chief Judge: Appellee, the University of Southern California (USC), on October 7, 1971, initiated suit in the district court seeking to restrain appellant agencies from instituting any action over USC's increase in its reserved seat ticket prices for the 1971 football season. Appellants, the Cost of Living Council (CLC), and the Office of Emergency Preparedness (OEP), had informed USC that the price increase violated the wage-price freeze announced by President Nixon on August 15, 1971. On May 12, 1972, the district court, finding that there were no material issues of fact and that appellee was entitled to judgment as a matter of law, granted appellee's motion for summary judgment. For the reasons stated below, we reverse the decision of the trial court, and remand for further proceedings consistent with this opinion.

I. *FACTS*

On January 28, 1971, USC's "Ticket Committee" met and by official resolution increased the price of reserved seats for each home football game by 50¢ above the 1970 level. This resulted in an increase to $6.50 per ticket for all games in the 1971 season with the exception of the gridiron classic, the USC-UCLA game, for which the ticket price was increased from $7.00 to $7.50. Prior to July 16, 1971, (the beginning of the thirty-day "base period" established by the President's Order) approximately 127,500 tickets were sold for games to be played during the freeze period (August 15

through November 13, 1971). During the thirty-day base period an additional 5,000 tickets were sold. Ultimately a total of 176,099 reserve seat tickets for the games in question were sold at the increased rate, placing the amount in controversy in excess of $88,000.[1]

Executive Order No. 11615 (Order), 3 C. F. R. 199 (1971), issued on August 15, 1971, "froze" the prices that could be charged for commodities and services to levels in existence at certain periods prior thereto. On October 5, 1971, USC's business office was notified by the OEP that the ticket price increase was not in compliance with the Order, that the prices would have to be reduced to the levels in existence during the 1970 season, and that "refunds to those who have purchased tickets for played games [the Alabama and Illinois games, on September 10 and 25, respectively] as well as for future games" were in order. If such actions were not carried out by USC, the OEP warned that "further action by the government [would] be required."[2] Two days later the declaratory judgment action in the district court was filed, seeking to restrain the CLC and OEP from instituting any action against USC for its refusal to discontinue selling prices at the reduced rate, or refund any amounts already received.

II. *EXECUTIVE ORDER 11615 AND ITS PROGENY*

When President Nixon initially addressed the nation concerning the matter of economic controls, he spoke of taking decisive action to "break the vicious circle of spi-

[1]See affidavits attached to USC's Motion for Summary Judgment, No. 71-2426-WP6, March 1, 1972.

[2]The notification was in the form of a telegram from Ralph D. Burns, Regional Director, Office of Emergency Preparedness, to Mr. Elkin D. Phillips of the USC Business Office.

raling prices and costs," and ordered a "freeze on all prices and wages throughout the United States for a period of 90 days." Executive Order No. 11615, issued concurrently with the President's address and under the authority of the Economic Stabilization Act of 1970,[3] was the means to that end. The regulatory section of the Order was but one paragraph in length, and provided:

> "Section 1. (a) Prices, rents, wages and salaries shall be stabilized for a period of 90 days from the date hereof at levels not greater than the highest of those pertaining to a substantial volume of actual transactions by each individual, business, firm or other entity of any kind during the 30-day period ending August 14, 1971, for like or similar commodities or services. If no transactions occurred in that period, the ceiling will be the highest price, rent, salary or wage in the nearest preceding 30-day period in which transactions did occur. No person shall charge, assess, or receive, directly or indirectly, in any transaction prices or rents in any form higher than those permitted hereunder, and no person shall directly or indirectly, pay or agree to pay in any transaction wages or salaries in any form, or to use any means to obtain payment of wages or salaries in any form, higher than those permitted hereunder, whether by retroactive increase or otherwise.

The Order further established a Cost of Living Council, to which was delegated all of the President's power

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[3]P. L. 91-379, 84 Stat. 799 (1970); P. L. 91-558, 84 Stat. 1468 (1970); P. L. 92-8, 85 Stat. 13 (1971); P. L. 92-15, 85 Stat. 38 (1971); subsequently amended P. L. 92-210, 85 Stat. 743 (1971) [ECONOMIC CONTROLS ¶ 8005.10].

under the Economic Stabilization Act of 1970, and the power to issue rules and regulations, prescribe definitions, and grant exemptions. Thus the task of filling in the interstices of the skeletal outline provided by the Order, and of literally injecting life into the program, was consigned to the CLC.[4]

The CLC, on August 17, 1971, in Cost of Living Order No. 1, 36 Fed. Reg. 16215 (Aug. 20, 1971), effectively delegated the above powers to the Director of the Office of Emergency Preparedness. The Director promptly issued, on August 20, 1971, Economic Stabilization Regulation No. 1 (hereinafter "Regulation"), 32A C. F. R. 35 (1972), which, as amended, became the only "regulation" issued throughout the 90 day freeze. The Regulation, itself very brief and basic in content, had as its stated purpose providing the "initial guidance and procedures for implementing the stabilization of prices . . . ." On August 24, 1971, the first amendment to the Regulation was published in the Federal Register stating, *inter alia,* that "OEP shall from time to time issue circulars containing implementing instructional material which shall be set forth in Appendix I to this regulation." E. S. Reg. 1, § 11(b), 32A C. F. R. 39 (1972). Between August 24 and November 13, 1971, twenty-six such circulars were issued and published.

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[4]Section 4(a) of the Order provides: "The Council, in carrying out the provisions of this Order, may (i) prescribe definitions for any terms used herein, (ii) make exceptions or grant exemption, (iii) issue regulations and orders, and (iv) take such other actions as it determines to be necessary and appropriate to carry out the purposes of this Order." [ECONOMIC CONTROLS ¶ 8005.25.]

All circulars contained the following statement of purpose:

> This circular is designed for general information only. The statements herein are intended solely as general guides drawn from OEP Economic Stabilization Regulation No. 1 and *from specific determination by the Cost of Living Council* and do not constitute legal rulings applicable to cases which do not conform to the situations clearly intended to be covered by such guides.
>
> Note: Provisions of this and subsequent circulars are subject to clarification, revision, or revocation. (Emphasis supplied).

Circular No. 7, published September 2, provided in pertinent part:

> A transaction takes place when the seller ships the product to the buyer, not when the order is received. *In the case of a service, the transaction takes place when the service is performed.* (36 Fed. Reg. 17578, Sept. 2, 1971) (emphasis supplied).

Circular No. 11, published September 11, 1971, provided in pertinent part:

> The freeze applies to prices of advance sale tickets for sporting events occurring during the freeze. (36 Fed. Reg. 18315, Sept. 11, 1971).

Nowhere in the Order, Regulation, or circulars is there an express denomination of a sporting event as a "service," nor in the Order or Regulation is there a definition of "transaction."

The district court found the "fundamental legal issue in this case (to be) the meaning of the word, 'trans-

actions,' as it is used in the Executive Order and the ensuing regulations." *University of Southern California v. Cost of Living Council*, 342 F. Supp. 606, 608 (C. D. Cal. 1972). [Economic Controls ¶ 9924.] While USC urged that the transaction involved was the sale of the tickets, the OEP and CLC opined that the sale of the tickets was merely preparatory to the performance of a *service*, namely the playing of the football game, and that as "(i)n the case of a service, the transaction takes place when the service is performed," USC would be obliged to look to the 1970 football season for its ceiling price. That is, since no transactions—football games—occurred during the 30-day period ending August 14, 1971, the ceiling would have to be "the highest price . . . in the nearest preceding 30-day period in which transactions did occur." Executive Order No. 11615, *supra*.

The district court flatly rejected the agencies' position and ruling, finding "no suggestion in the order or in the administrative regulation based upon it . . . that such controls would have retroactive effect and require refunds of prices charged in the transactions that antedated the Executive Order." The court rebuffed the contention that the "pertinent transactions" took place with the playing of the games rather than the selling of the tickets, and found Circular No. 11 "not in harmony with the purposes and provisions of the Executive Order and Regulation No. 1" and "inconsistent with other rulings of the Cost of Living Council." 342 F. Supp. at 607-08, 609.

III. *Scope of Review*

The Executive Order of August 15 left the Cost of Living Council (and by its delegation the Office of Emergency Preparedness) with a "gargantuan" task.[5] In delegating to the agencies the duty to develop the very definitions of the words used in the Order, the broadest possible delegation of power was given. As this court recently stated in *United States v. Lieb*, T. E. C. A. No. 5-1 (June 14, 1972) [Economic Controls ¶ 9918.]:

> The President has made the *broadest delegation of power to the Council*, allowing it to use its own discretion as to the best means of achieving the purposes of the Executive Order, which are "to stabilize the economy, reduce inflation, and minimize unemployment [by stabilizing] prices, rents, wages and salaries." (Slip op. at 8, emphasis supplied).

It is a well settled principle that the courts place great weight on the interpretations given to statutes and regulations by those agencies charged with the responsibility of administering them. See, *e.g.*, *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945); *Udall v. Tallman*, 380 U. S. 1, 16 (1965), and the cases cited therein. This "great deference test analyzed thoroughly by both parties to this lawsuit and specifically recog-

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[5]The branding of the burden facing appellants as "gargantuan" is taken from *United States v. Jefferson Parish School Board*, 333 F. Supp. 418, 423-24 (E. D. La. 1971) [ECONOMIC CONTROLS ¶ 9996.]: "The Court recognizes the difficulty incumbent in the administration of the Stabilization Act and Executive Order. The Court takes notice that the federal agencies responsible for this gargantuan task have been swamped with myriad requests for administrative determinations and have been beset from all directions with inquiries as to the specific application of the wage-price freeze."

nized by this court in *Lieb*, is particularly appropriate when, as here, the administrative practice at stake "involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Power Reactor Co. v. Electricians*, 367 U.S. 396, 408 (1961).

We can propound no situation more compelling for the application of the "great deference test" than that presently before us. Only the barest foundation has been laid by the Executive Order—the definitions of such key words as "prices," "rents," "salaries," "substantial volume," "commodities," "services," and, yes, "actual transactions," have been left to the CLC and the OEP. Their determinations—subject to the constant limitation of reasonableness in accomplishing the purposes of the Order—set the depth and breadth of the controls.

Appellee would have us abrogate and abandon the deference owed to the administrative rulings for a variety of reasons—among them the "haste" and lack of "accumulated administrative expertise" under which the rulings were issued. As to the latter, the CLC, whose rulings comprised the foundational material for circulars issued by the OEP, had in its membership the Secretaries of Treasury, Agriculture, Commerce, Labor, the Director of the Office of Management and Budget, the Chairman of the Council of Economic Advisers, and the Special Assistant to the President for Consumer Affairs. Executive Order No. 11615, § 2(b), *supra*. These are men of no little "administrative expertise," and men who in fact occupy such positions as to know better than most the causes of inflation, the reasons for the

freeze, and the purpose and intent of the Executive Order.

As to "haste," the freeze itself, if it was to be effective, had to be implemented fully and immediately. Rules, regulations, and crucial definitions had to be issued. Haste was not a vice but a virtue, and the waste and inconsistencies that usually accompany it were probabilities, not mere possibilities. This court cannot and will not close its eyes to the realities of the situation facing the agencies. If the haste necessitated gave rise to unreasonable inconsistencies in the administrative interpretations, or to actions plainly without the purpose and scope of the Order, then we will readily rectify them. We will not, however, absent actions akin to the above, substitute our views for those of the agencies. According deference to an agency's interpretations is not allowing government by "bureaucratic fiat," it is avoiding government by "judicial fiat."[6]

IV. *Refund*

The trial court determined that the "retroactive nature of the burden" that the CLC and OEP seek to impose by requiring a refund was unsanctioned by the Executive Order. The court stated that the

> obvious purpose of the Executive Order was to stabilize prices as of the date of that order . . .

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[6]We find the language of *Unemployment Comm'n v. Aragon*, 329 U. S. 143, 153 (1946), although arising in the context of an administrative body's interpretation of a state statute, to be most relevant to this situation: "Here . . . the question presented 'is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially.' To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings. The 'reviewing court's function is limited.' "

> and thus to prohibit sellers from increasing their prices beyond those charged prior to that date. There is no suggestion in the order or in the administrative regulation based upon it . . . that such controls would have retroactive effect and require refunds of prices charged in transactions that antedated the Executive Order.

(342 F. Supp. at 607-08). In a sense it does not appear necessarily that the controls involved here were applied retroactively; if we are correct in our view that the actual transactions (or services) were the exhibitions of the games in question to spectators who had then or theretofore paid and been given admission, such transactions did not actually occur until after the issuance of the Executive Order. Be that as it may, in our opinion in the context here, we believe that the power of giving the controls effect, notwithstanding prior ticket sales, was vested in the administrative agency.

The Economic Stabilization Act of 1970 gave to the President the plenary power to stabilize prices "at levels not less than those prevailing on May 25, 1970." The Order and interpretive rulings with which we are concerned clearly fall within the limits of this mandate. The right of the Government to apply the freeze to existing contracts, a right which has not been seriously disputed, has been expressly recognized of late in *Amalgamated Meat Cutters & Butcher Workmen v. Connally*, 337 F. Supp. 737 (D. D. C. 1971). [Economic Controls ¶ 9995.]

The fact that payment has been received for an event to be performed in the future does not alter this "doctrine of impairability." As in other contexts the date of performance of the "service" may be given effect as the

determinative of the time governing the application of the price ceilings, as more fully discussed hereinafter.

The power of the district court to order a refund in the proper situation is evident. Section 7 of the Order provided two express sanctions for violations of the Order (or rules or regulations issued under authority of the Order)—a fine, and a request by the CLC for the Department of Justice "to bring actions for injunctions authorized under Section 205 of the Economic Stabilization Act of 1970:" Section 205 of the Act, in addition to providing for a permanent or temporary injunction or restraining order, also states that "upon application of the agency, any such court may also issue a mandatory injunction commanding any person to comply with any regulation or order under this title." The power to issue mandatory injunctions includes the power to order restitution or refund of funds held in violation of the regulations and rulings of the CLC and the OEP. See *Porter v. Warner Holding Co.*, 328 U. S. 395, 399-400 (1946), which considers such a power both "an equitable adjunct to an injunction decree," and "appropriate and necessary to enforce compliance" with the governing Act (then the Emergency Price Control Act of 1942); *United States v. Lieb, supra,* where an order for restitution was enforced.[7]

Once again we must repeat that we are faced with the broadest of delegations of authority, delegation that carried with it the power to "take such . . . action as [the CLC] determines to be necessary and appro-

[7]Empowering the courts to mandate "any person to comply with any regulation or order," necessarily includes requiring an offender to conform his conduct to the law. Requiring restitution places him in the fiscal position which he would have occupied but for his violation [ECONOMIC CONTROLS ¶ 9918].

priate to carry out the purposes of the Order."[8] That such a broad grant of power contains within it the authority to require refunds in situations such as this in order to give maximum effect to the wage-price freeze seems totally reasonable. While this court recognizes the considerable burden that such a refund demand places upon USC,[9] we recognize also the right of the agencies to require it. Faced with what we believe to be no clear showing that the Order denies such a power, and faced with the broad grant of authority to the agencies under which such a power can readily be implied, we find the power to demand such a refund properly at the appellants' disposal.

Yet even when such a power does exist, it must be exercised only when so doing manifests a reasonable interpretation of the Executive Order. Here again, appellee and the district court find fault with the appellants' actions. Repelling at the CLC and OEP interpretation of "transaction" as taking place when the football game is actually performed, as opposed to when the tickets are sold, the appellee brands such action as evidence of an inconsistent and unreasonable interpretation. Recognizing the deference due and owing the agencies' interpretations and rulings, we respectfully disagree.

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[8]*Supra* note 4.

[9]Although appellee in its brief asserts that it does not raise "inequity" as a defense to the agencies' action, we feel this played an important role in the trial court's determination, and make reference to *Amalgamated Meat Cutters & Butcher Workmen v. Connally*, 337 F. Supp. 737, 758 (D. D. C. 1971) [ECONOMIC CONTROLS ¶ 9995]: "[B]road emergency price control measures need not entitle each particular seller to consideration of the equity of his position, for such an obligation would impose an administrative impracticability that would defeat the very purpose of the Act."

V. *Transaction*

Although the Executive Order and Regulation contained no definition of "actual transaction," Circular No. 1, appearing in the Federal Register only nine days after the Order issued, stated at § 401(d):

> The ceiling price for the sale of a commodity or service is the highest price at which a seller *delivered* or *furnished* during the base period such *commodity* or *service* to purchasers in a substantial number of transactions . . . .

(36 Fed. Reg. 16586, Aug. 24, 1971) (emphasis supplied). This idea of delivery or performance as constituting the incident of "transactions" runs throughout the circulars. Circular No. 7, published only nine days later, made clear that in the case of a sale of a commodity "[a] transaction takes place *when the seller ships the product to the buyer, not when the order is received.*" As to a service, the circular asserted the completely consistent position that "[i]n the case of a service, the transaction takes place *when the service is performed.*" 36 Fed. Reg. 17578 (Sept. 2, 1971) [emphasis supplied). Orders received for goods on which delivery was yet to be made at the time of the freeze could not be considered "transactions" for purposes of establishing a ceiling price. In some instances, as here, it was necessary to go back a year in time to find "transactions" from which a ceiling price could be established. For example, when discussing the sale of "holiday specialty items," Circular No. 102,[10] 32A C. F. R.

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[10]Following Circulars Nos. 1-10, a superseding compilation of all ten circulars, Circular No. 101, 32A C. F. R. (1972), was published. Following Circular Nos. 11-20, Circular No. 102 was published in like manner [ECONOMIC CONTROLS ¶ 8285-8306].

55 (1972), published on October 22, 1971, stated at § 303(2).

> Candy manufacturers who make specialized holiday candies for occasions such as Halloween, Thanksgiving, and Christmas must use the prices of the last shipments of such candies—probably those made last year prior to the special events involved—to establish their ceiling prices.

The provision of Circular No. 14, 36 Fed. Reg. 18654 (Sept. 18, 1971), that an order *plus* deposit does not constitute a transaction price for purposes of establishing the ceiling, absent delivery, and of Circular No. 16, 36 Fed. Reg. 19030 (Sept. 25, 1971), that work in progress "preparatory to provision of the final service does not qualify as a transaction" are also consistent with appellants' usage of the term in relation to advance sale of season tickets. Until the ultimate service is performed, no "transaction" takes place.

Appellee singles out only one position of the agencies contrary to the above, and that relates to the very specialized area of education. It is interesting to note that the agencies themselves admitted the "uniqueness" of their position regarding education (which allowed previously announced tuition, board and room increases to go into effect although the performance of the "service" in most instances did not occur until after the freeze began) in Circular No. 15, § 403 (1), 36 Fed. Reg. 18867 (Sept. 23, 1971):

> This treatment of the student-school relationship is unique to tuition and room and board transactions and does not apply to any other form of transactions.
>
> The use of prior announcement and payment to show completion of transactions results from

> the unique arrangement schools have with their enrolled students. Although the level of service performed by the schools varies with the school year, certain year-round services are available to enrolled students . . . .

In light of tuition's short-lived total exemption from the price freeze, and the particularly singular nature of education as a whole, we do not find the agencies' actions regarding the definition of "transaction" for tuition, room and board in the area of education to be necessarily unreasonable.[11]

Thus, we find the agencies' implied assertion that a sporting event constituted a service,[12] the performance of which only could be considered a "transaction" for

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[11]Pursuant to the authority delegated to it to grant "exemption" the CLC in Regulation No. 1 initially exempted raw agricultural products, stocks and bonds, exports, and school tuition. Executive Order No. 11615, § 4(a), 3 C.F.R. 199 (1971); CLC Reg. No. 1, § 4(b) 36 Fed. Reg. 16515 (Aug. 21, 1971). Three days later, in CLC Reg. No. 1, Amdt. No. 1, 36 Fed. Reg. 16585 (Aug. 24, 1971), the exemption for school tuition was removed. The circulars subsequently issued continued the CLC's specialized treatment of the school tuition problem [ECONOMIC CONTROLS ¶ 8005, 8241-8283, 8285 and 8282].

Finding as we do that any inconsistencies in interpretation are reasonable, a thorough discussion of *United States v. Jefferson Parish School Board*, 333 F. Supp. 418 (E. D. La. 1971) is not required. *Jefferson* concerned the troublesome problem of whether contracted teacher wage increases that took effect prior to the price freeze could continue, although services rendered by the teachers did not begin until during the freeze. The CLC and OEP issued several inconsistent circulars regarding this one issue, and the Louisiana federal district court determined that the language of the Regulation (which in the court's opinion allowed the increase to stand) should prevail. While reserving judgment on the merits of *Jefferson*, we find it clearly distinguishable from the present situation. Here no conflict exists between the Order, Regulation and circulars, and it is between distinct areas of control that any inconsistency in the circulars arises.

[12]As stated early in this opinion, nowhere in the Order, Regulation, or circulars can there be found a definitive statement

purposes of setting the base period ceiling price, and hence that "the freeze applies to prices of advance sale tickets for sporting events occurring during the freeze," to be a reasonable and consistent interpretation of the Executive Order, and one entitled to this court's respect.

The appellee's final argument, that the agencies' altering of the "transaction" definition in its administration of Phase II (so as to include the advance sale of tickets) should somehow influence our judgment as to the initial application is ill-founded. It is not unlikely that a justifiable change in policy considerations brought about the Phase II alterations, or perhaps the agencies recognized a better method, each of which is an administrative prerogative. However, that does not mean that their original actions were unreasonable, or not entitled to the deference this court has determined is due.

VI. *Conclusion*

The action of the district court in granting appellee's motion for a summary judgment, thus restraining the appellants from initiating action to enforce compliance with Executive Order 11615, as interpreted, is hereby reversed, and remanded for further proceedings consistent with this opinion.

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that sporting events qualify as services. While it is with no small difficulty that sporting events can be fit within the Regulation definition of services, the agencies from a very early date impliedly treated them as such. That a multi-million dollar enterprise should be so classified does not appear to this court to be unwarranted, or unreasonable. The Regulation was issued but nine days after the Executive Order, and because of its very compact nature should be read, wherever feasible, in light of the circulars with as much latitude as possible.

APPENDIX "B"

Memorandum and Decision.

University of Southern California, a nonprofit corporation, Plaintiff, v. Cost of Living Council and Office of Emergency Preparedness, Agencies of the Government of the United States of America, Defendants. Civ. No. 71-2426.

United States District Court, C. D. California. May 12, 1972.

Action seeking, among other things, declaration that prices for tickets to college football games were not in violation of Phase I "price freeze" promulgated by executive order. The District Court, William P. Gray, J., held that where price increase for season tickets to college football games had been announced and increased price collected prior to executive order requiring prices to be stabilized for 90-day period at levels not greater than highest of those pertaining to substantial volume of actual transactions during specified prior 30-day period, price increase was exempt from price freeze, notwithstanding that five of the six games were played during the 90-day "freeze."

Order accordingly.

Musick, Peeler & Garrett by Gerald G. Kelly, James B. Bertero, Robert J. Heil, Los Angeles, Cal., for plaintiff.

William D. Keller, U.S. Atty. by Frederick M. Brosio, Jr., Chief of Civil Division by Matthew A. Schumacher, Asst. U.S. Atty., Los Angeles, Cal., for defendants.

MEMORANDUM OF DECISION

WILLIAM P. GRAY, District Judge.

The University of Southern California (USC), the plaintiff in this action, seeks, among other things, a summary judgment declaring that its prices for tickets to its 1971 football games were not in violation of the Phase I "price freeze" that was promulgated by Executive Order No. 11615, signed by the President on August 15, 1971 (36 Fed. Reg. 15727). The defendants, through the United States Attorney and representatives of the Department of Justice, agree with the plaintiff as to the facts and, therefore, that this is a proper case for summary judgment; but they contend that such facts constitute violation of the subject Executive Order.

For reasons hereinafter set forth, the declaratory relief sought by the plaintiff will be granted.

Executive Order No. 11615 decreed, in effect, that for a period of 90 days following the date of the Order (August 15, 1971), prices were to be stabilized ". . . at levels not greater than the highest of those pertaining to a substantial volume of actual transactions by each individual, business, firm, or other entity of any kind during the 30-day period ending August 14, 1971, for like or similar commodities or services. If no transactions occurred in that period, the ceiling will be the highest price . . . in the nearest preceding 30-day period in which transactions did occur."

On January 28, 1971, the appropriate authoritative body of USC by formal resolution voted that the prices of reserved seats for each of its home football games in 1971 would be increased by 50 cents above those charged during the 1970 football season. On about April 30, 1971, USC distributed printed brochures that

announced the 1971 football schedule and solicited the purchase of tickets for reserved seats, at the increased price, on a season ticket basis or for individual games. Before July 16, 1971 (the beginning of the 30-day base period established by the Executive Order), USC had sold and received payment for about 125,000 tickets to the six home games on a season basis and several thousand additional tickets to individual games. During the 30-day base period (July 16 to August 14), USC sold about 5,000 more tickets. Five of the six home games were played during the 90-day "freeze" established by the Executive Order; the last game was played on November 20, 1971.

On about October 5, 1971, the defendants notified USC that the price increase was in violation of the Executive Order and have demanded that refunds of 50 cents per ticket be made to all purchasers thereof.

The obvious purpose of the Executive Order was to stabilize prices as of the date of that order, August 15, 1971, and thus to prohibit sellers from increasing their prices beyond those charged prior to that date. There is no suggestion in the order or in the administrative regulation based upon it (Economic Stabilization Reg. No. 1, 36 Fed.Reg. 16515, August 21, 1971) that such controls would have retroactive effect and require refunds of prices charged in transactions that antedated the Executive Order.

The defendants insist, however, that their demand does not involve retroactivity. They contend that the "transactions" affected by the order were not the sales of tickets but, instead, were the playing of the games. According to the defendants, inasmuch as there were no such "transactions" during the base period (July 16

to August 14, 1971, inclusive), the 1971 prices may not exceed those of the 1970 football season, which was the "nearest preceding 30-day period in which transactions did occur," as required by the Executive Order.

The fundamental legal issue in this case is the meaning of the word, "transactions," as it is used in the Executive Order and the ensuing regulations. If the defendants are correct in their interpretation, USC would be compelled to attempt to return to each of the many thousands of purchasers of its tickets a small portion of the money that it charged, fully collected, and at least partially spent or committed well before August 15, 1971 (the date of the Executive Order). The increases in prices presumably were made in good faith and at a time when the President was insisting that he would not impose price controls, despite the authorization thereof by Congress in August of the preceding year.* No amount of interpretation or rationalization can remove the retroactive nature of the burden that the defendants here seek to impose.

In support of their contention that the "transactions" here concerned were the playing of the games, the defendants refer to the fact that the Executive Order and Economic Stabilization Regulation No. 1 (36 Fed. Reg. 16515, August 21, 1971) pertain to "transactions" involving prices for *commodities* and *services*. They then assert that the playing of the football games constitutes the rendering of services, and they refer to OEP Economic Stabilization Circular No. 7, which rules that "In the case of a service, the transaction takes place when the service is performed." (36 Fed.Reg. 17578, September 2, 1971).

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*See Economic Stabilization Act of 1970, P.L. 91-379, Title II, 84 Stat. 796.

The playing of a football game is hardly synonymous with the rendering of services, as that term is used in the Executive Order and the formal implementing regulation, as well as in normal parlance. A tackle on the USC Varsity would be surprised to hear the thought expressed that his performance in a game is in fulfillment of his employment to provide a service for the spectators as his customers or clients, comparable to services rendered by an electrician or a lawyer. The goal (at least the acknowledged goal) of a college football player is to represent his school as a member of the team and to help win the game and perhaps the championship. The ticket holders are incidental; and the game presumably would be played with comparable motivation whether or not there were spectators in attendance. It is relevant to note that many intercollegiate athletic contests are held and earnestly fought virtually without paying spectators.

The plaintiff points out that the purchaser of a season ticket, rather than contracting for future services, is completing a transaction in which he gives and receives value. He obtains the right to view the games from a particular reserved seat, and his name is put on a preference list which accords him the availability of progressively better seats in successive seasons. In return, he pays the full purchase price without any right to a refund, and the games are played whether or not he is present.

In view of all of the foregoing, I am not able to accept the defendants' contention that we are here concerned with service contracts and that the pertinent transactions therefore occurred with the playing of the games rather than the selling of the tickets.

However, the defendants' demand upon the plaintiff is supported by OEP Economic Stabilization Circular No. 11 (36 Fed.Reg. 18315, September 11, 1971), which asserts that "The freeze applies to prices of advance sale tickets for sporting events occurring during the freeze." It must now be considered whether or not such a statement should be deemed controlling.

Apart from what seems to me to be the absence of any justification for such a conclusion on the ground that the sporting event itself is the "transaction" in the form of rendering of services, application here of the above quoted assertion from Circular No. 11 has another major defect. It gives insufficient significance to the fact that full payment for the tickets here concerned was made before the price freeze was announced, and that to require the refunds would involve the inequity of retroactivity.

As is mentioned earlier in this memorandum, nothing in the Executive Order or in Economic Stabilization Regulation No. 1 (36 Fed.Reg. 16515, August 21, 1971) suggests restrictions on anything other than prospective charging and payment of prices. It is true that contracts entered into before the wage freeze and which provided for increases of compensation to be paid for future services have been held to be affected by the Executive Order here concerned, because "contracts do not fetter the constitutional authority of Congress." Amalgamated Meat Cutters and Butcher Workmen of North America, A.F.L.-C.I.O v. Connally, 337 F.Supp. 737, 763 (3-judge Court, D.C.1971). However, there, the Executive Order was issued before any work or payment under the contract occurred, a situation quite different from the one here concerned, where full payment for the tickets had already been received.

On other occasions the Cost of Living Council has published circulars that are inconsistent with Circular No. 11 with respect to the effect of the Executive Order upon prices charged and received before the date of that order. On August 18, 1971, the Council published its "Question and Answer List #1," which contained the following:

> "Q. Are previously announced increased tuition rates for the 1971-72 school year permitted by the freeze?
>
> "A. Yes. These are considered transaction prices, *since commitments have been made and there are a number of cases where payments have been made.*" (Emphasis added).

One week later, the following interpretation was issued:

> "Q. Are college and school room and board rates exempt from the freeze?
>
> "A. No. School and college room and board payments are handled just like tuition. If there were substantial transactions during the base period (*confirmed by deposits*), the increase may be charged. If there was not a substantial volume, the increase is not allowed." CLC Questions & Answers List #6, August 25, 1971; see also OEP Circular No. 101, § 403(9). (Emphasis added).

Neither the Executive Order nor Regulation No. 1 suggests any reason why prepayment for the right to see a college football game should be treated any differently than prepayment of tuition or of room and board.

It is the conclusion of this court that the hereinabove quoted provision of Circular No. 11 should not be given effect in this case because it is not in harmony with the purposes and provisions of the Executive Order and

Regulation No. 1 and is inconsistent with other rulings of the Cost of Living Council.

The attitude in which this decision is reached is in full accord with a concluding comment by Judge R. Blake West in his opinion in United States v. Jefferson Parish School Board, 333 F.Supp. 418, 423 (E.D.La. 1971), which involved a closely related problem:

> "The Court recognizes the difficulty incumbent in the administration of the Stabilization Act and Executive Order. The Court takes notice that the federal agencies responsible for this gargantuan task have been swamped with myriad requests for administrative determinations and have been beset from all directions with inquiries as to the specific application of the wage-price freeze. Conflicting guidelines are perhaps inevitable because of the immediacy and urgency of the administrative inquiries. Nevertheless, the Court cannot elevate to the level of enforceable law the inconsistent and contradictory directives provided by the various Circulars. Instead, the Court will adhere to Regulation No. 1 as properly interpretative of the Executive Order."

Judgment will issue declaring that the prices of the plaintiff's sales of tickets for its 1971 football season were not in violation of Executive Order No. 11615.

APPENDIX "C"

United States Constitution, Article I, Section 10, Clause 1:

> "No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility."

United States Constitution, Fifth Amendment:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Executive Order No. 11615 § 7(a), 36 Fed. Reg. 15727 (1971):

> "Whoever willfully violates this Order or any order or regulation issued under authority of this Order shall be fined not more than $5,000 for each such violation."

32A C.F.R. § 2(a):

> "No person may charge, assess, or receive more for commodities and services than the highest

prices, including customary price differentials, pertaining to a substantial volume of actual transactions in any class of trade by such person which were in effect during the base period."

32A C.F.R. § 3(a)(1):

"The ceiling price for the sale of a commodity or service is the highest price at which a seller delivered or furnished such commodity or service to purchasers in a substantial number of transactions during the base period."

32A C.F.R. § 6(a)(1):

" 'Base period'—for any commodity, service, rent, salary or wage includes the period from July 16, 1971 through August 14, 1971, and, in the event that no transaction occurred in the latter period, the nearest preceding 30-day period in which a transaction did occur, provided, however, that prices, rents, wages, and salaries need not be established at levels less than those prevailing on May 25, 1970."

32A C.F.R. § 6(a)(6):

" 'Sale'—includes sales, dispositions, exchanges, and other transfers and contracts."

32A C.F.R. § 6(a)(13):

" 'Substantial volume of transactions'—is determined as follows:

The ceiling price is the price at or above which 10% of the actual transactions during the base period were made, except that in the case of increases in posted and effective prices during the base period, the base period itself will be considered to have begun at the time of the increase in posted and effective prices."

Cost of Living Council Summary No. 3 (September 12, 1971), in pertinent part, provides as follows:

"Season ticket and single event price increases for sports and other forms of entertainment are not allowed during the freeze.

"Admission prices for events occurring during the freeze period may be no higher than charges made for those programs taking place during the base period (in the case of football or the World Series this will generally be the price charged last year). This includes advance ticket sales for any events occurring during the freeze.

"Those who already have purchased tickets at prices higher than those permitted should be reimbursed."

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-825

UNIVERSITY OF SOUTHERN CALIFORNIA, PETITIONER

v.

COST OF LIVING COUNCIL AND OFFICE OF EMERGENCY PREPAREDNESS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

1. Petitioner instituted this action in the United States District Court for the Central District of California to challenge a ruling by the Office of Emergency Preparedness, made pursuant to the Economic Stabilization Act of 1970 (P.L. 91-379, 84 Stat. 799, as amended), that the 50 cent price increase for the university's football tickets violated the Phase I price freeze requirements embodied in Executive Order No. 11615. The district court held that the freeze did not apply to the price of tickets sold in advance of the freeze, and accordingly restrained the Office of Emergency Preparedness and the Cost of Living Council

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from initiating action to compel petitioner to refund 50 cents per ticket to all purchasers (Pet. App. B, pp. 17–24). The Temporary Emergency Court of Appeals reversed, holding that respondents reasonably construed the Executive Order to apply to advance ticket sales when, as here, the sporting events occurred during the freeze (Pet. App. A, pp. 1–16). Petitioner now seeks review of that decision.

2. The decision below is correct, and further review is not warranted.

a. Petitioner's contention (Pet. 9–11) that Executive Order No. 11615 does not support the refund order was thoroughly considered and rejected by the court below (Pet. App. A, pp. 2–16), and we rely on its opinion.[1]

b. There is no merit to petitioner's contention (Pet. 11–12) that the Executive Order, by requiring petitioner to refund excessive charges collected in advance for services rendered during the freeze,[2] im-

[1] The court stated (Pet. App. A, p. 11–12):

"[W]e are faced with the broadest of delegations of authority, delegation that carried with it the power to 'take such . . . action as the [the CLC] determines to be necessary and appropriate to carry out the purposes of the Order.' That such a broad grant of power contains within it the authority to require refunds in situations such as this in order to give maximum effect to the wage-price freeze seems totally reasonable." * * *

[2] Section 205 of the Economic Stabilization Act expressly authorizes district courts to issue mandatory injunctions to effectuate the purpose of the Act, and, as the court below observed (Pet. App. 11), "[t]he power to issue mandatory injunctions includes the power to order restitution or refund of funds held in violation of the regulations and rulings of the CLC and the OEP".

pairs petitioner's right to contract and deprives petitioner of a vested right in violation of the Fifth Amendment to the Constitution. Congress may, consistent with the Fifth Amendment, disturb existing contractual arrangements which are designed to operate in the future. See *Fleming* v. *Rhodes*, 331 U.S. 100; *Dillingham* v. *McLaughlin*, 264 U.S. 370; *Marcus Brown Co.* v. *Feldman*, 256 U.S. 170. "Immunity from federal regulation is not gained through forehanded contracts." *Fleming* v. *Rhodes, supra*, 331 U.S. at 107. The refund order at issue here applies only to charges assessed for prospective games to be played during the freeze, and has no application to sporting events conducted by petitioner prior to that time.

c. Petitioner also contends (Pet. 13–16) that the Executive Order, as applied in this case, is an *ex post facto* law and a bill of attainder in violation of Article I, Section 9, Clause 3. An *ex post facto law* punishes past conduct not unlawful when engaged in. *Calder* v. *Bull*, 3 Dall. 386; *Ex parte Garland*, 4 Wall. 333. "A bill of attainder is a legislative act which inflicts punishment without a judicial trial." *Cummings* v. *Missouri*, 4 Wall. 277, 323.

Neither the statute nor the Executive Order here "punishes" petitioner; there is no "punitive design" in the regulatory scheme. *Fleming* v. *Nestor*, 363 U.S. 603, 617. This Court in *Fleming* v. *Nestor* upheld a statute under which old-age Social Security benefits were terminated because the beneficiary was deported for having belonged to the Communist Party 20 years

earlier. The Court stated the governing standards as follows (363 U.S. at 614).

> Where the source of legislative concern can be thought to be the activity or status from which the individual is barred, the disqualification is not punishment even though it may bear harshly upon one affected. * * *

Here, as in *Nestor,* the legislative concern is regulatory. Although the particular refund order may "bear harshly" upon petitioner, it does not inflict a punishment.

d. We note also that the ruling sought to be reviewed here was a temporary measure extending only through the 90-day emergency freeze period of Phase I; it has no application in the current phase of the Economic Stabilization Program. The issue therefore is of minimal prospective importance.[3]

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

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[3] Fewer than a dozen cases involving this issue have been referred to the Department of Justice for its consideration, and only two cases are pending in the district courts.

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